

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VIRTUDES ARCE,

Plaintiff

v.

CIVIL 10-1032 (FAB) (JA)

JOHN E. POTTER, POSTMASTER
GENERAL,

Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on motion to dismiss and memorandum of law in support of motion to dismiss filed by defendant John E. Potter on October 27, 2010. (Docket Nos. 22, 23.) The defendant's motion to dismiss was opposed by plaintiff Virtudes Arce on December 13, 2010. (Docket No. 26.) Defendant replied to plaintiff's opposition on December 27, 2010. (Docket No. 30.) This case had been referred to a United States magistrate judge, and randomly assigned to me for all further proceedings except for pretrial conference and trial on June 15, 2010. (Docket Nos. 12, 13.) For the reasons set forth below, I recommend that the motion to dismiss be denied.

I. BACKGROUND

Plaintiff is hearing-impaired, (Docket No. 1, at 3, ¶ 5.1), and works as a Distribution Clerk of the United States Postal Service. (*Id.* at 2, ¶ 4.1.) She filed

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3 a complaint on January 20, 2010 seeking damages as a result of discriminatory
4 treatment (retaliation) in violation of Civil Rights Laws, 42 U.S.C. § 2000e et seq.,
5 and Rehabilitation Act, 29 U.S.C. § 701 et seq. (Docket No. 1, at 8-10.) Plaintiff
6 asserts that she has been "subject of a hostile work environment, continuous
7 intentional discrimina[tion] due to her hearing impairment and retaliatory
8 treatment on account of the filing of various Equal Employment Opportunity
9 Complaints and a civil action for discrimination." (Id. at 1, ¶ 1.1.) "Since
10 approximately the year 1995 Plaintiff . . . has filed several complaints alleging
11 violations by the Defendant of her rights to be free from disability discrimination
12 and retaliation. The last case was filed . . . in the year 2003 and terminated in a
13 consent settlement in the year 2005." (Id. at 3, ¶ 5.2.)

17 Defendant's memorandum of law in support of the motion to dismiss under
18 Rule 12(b)(1) of the Federal Rules of Civil Procedure argues for partial judgment
19 dismissing plaintiff's breach of contract claim. (Docket No. 23, at 11.) It states
20 three arguments. First, that some of the plaintiff's claims arise under contract law
21 since "[i]n the complaint there are allegations as to a previous case in 2003 that
22 terminated in a consent settlement in the year 2005 which plaintiff aver[s] has
23 been breached by the defendant" (id. at 1) and "[b]ecause it has been held that
24 a claim for breach of settlement agreement is a claim founded upon a contract
25 with the United States under the Tucker Act, this Court lacks jurisdiction over
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4 plaintiff's claim for its breach." (Docket No. 23, at 5.) Second, defendant asserts:
5 "[n]either the Judgment entered in Civil No. 03-1971 (JP) nor the Settlement
6 Agreement . . . contains a retention of jurisdiction clause to hear a breach claim
7 . . ." therefore, the breach of settlement claims should be dismissed. (Id. at 8.)
8 Finally, the defendant continues to argue that plaintiff did not exhaust
9 administrative remedies as required by 29 C.F.R. § 1614.504. (Docket No. 23,
10 at 9.)

12 In plaintiff's "Response in Opposition to Motion for Partial Summary
13 Judgment," (Docket No. 26), plaintiff notes that her "pledged claims arise under
14 the Rehabilitation act." (Id. at 4.) She argues that in the complaint there are no
15 claims "rais[ing] specific . . . breach of the settlement agreement . . . The
16 instances of violations of the prior settlement agreement . . . are used as
17 instances of a continuing pattern of specific acts of discrimination, not as
18 individual claims for specific breach of the prior settlement agreement." (Id.)
19 Moreover, she states that the allegations of breach to the settlement agreement
20 is part of the evidence needed "to conclude that the employer's adverse
21 employment actions against plaintiff were motivated by discriminatory intent."
22 (Id. at 8.) Finally, plaintiff points out that she has "[not] failed to exhaust
23 administrative remedies." (Id. at 12.)

27 II. STANDARD OF REVIEW

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3 Rule 12(b)(1) of the Federal Rules of Civil Procedure

5 "The basic statutory grants of federal-court subject-matter jurisdiction are
6 contained in 28 U.S.C. §§ 1331 and 1332. Section 1331 provides for '[f]ederal-
7 question' jurisdiction, § 1332 for '[d]iversity of citizenship' jurisdiction. A plaintiff
8 properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising
9 under' the Constitution or laws of the United States." Arbaugh v. Y & H Corp., 546
10 U.S. 500, 513 (2006). "The proper vehicle for challenging a court's subject-
11 matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1). This rule is a large
12 umbrella, overspreading a variety of different types of challenges to subject-
13 matter jurisdiction. Some challenges-those grounded in considerations of
14 ripeness, mootness, sovereign immunity, and the existence of federal question
15 jurisdiction are good examples" Valentín v. Hosp. Bella Vista, 254 F.3d 358,
16 362-63 (1st Cir. 2001).

17 III. ANALYSIS

21 Breach of the Settlement Agreement and the Tucker Act

22 The defendant argues that a part of the complaint should be dismissed
23 because it is "founded upon a contract with the United States under the Tucker
24 Act [and] this Court lacks jurisdiction over plaintiff's claim for its breach." (Docket
25 No. 23, at 5.) Defendant specifically refers to allegations from a "previous case
26 in 2003 that terminated in a consent settlement in the year 2005 which plaintiff
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3 aver[s] has been breached by the defendant." (Id. at 1.) He compares
4 paragraphs 5.2, 5.3, 5.7(b), 5.7(d), 5.7(e), 5.7(f), 5.7(g), 5.8, 5.9 and 5.91 of
5 the complaint (Docket No. 1) to the promises made in the 2005 settlement
6 agreement. (Docket No. 23, at 1.)

8 On the other hand, plaintiff denies that the complaint alleges a breach of
9 contract or settlement agreement. She points out that "any violations of a prior
10 settlement agreement constitute evidence of a pattern of continuing violations
11 actionable in this court under the Rehabilitation Act" (Docket No. 26, at 2,
12 emphasis omitted.) Moreover, she states that "[n]owhere in the [complaint does
13 plaintiff] raise specific claims for breach of the settlement agreement." (Id. at 4.)
14 And finally, she continues to assert: "The causes of action clearly asserted . . . in
15 this complaint are not based solely, on her damages due to violations of a prior
16 settlement or, as defendant asserts, an action sounding in contract for breach of
17 settlement agreement. Plaintiff seeks 'compensatory relief and damages as a
18 result of discriminatory treatment in violation of the Civil Rights laws and the
19 Rehabilitation Act . . . '" (Id. at 5 (citing Compl. ¶ 1.1 (emphasis omitted))).

23 Contrary to the defendant's argument, the complaint makes no portentous
24 reference to a breach of contract or a breach of settlement agreement. The
25 complaint only asks for remedies for illegal retaliation as prohibited by 42 U.S.C.
26 § 2000e-3 and 5 (in count one) and for violations of Rehabilitation Act. (Docket
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3 No. 1, at 8-9.) Although defendant cites Brown v. United States, 389 F.3d 1296,
4 1297 (D.C. Cir. 2004), it is America v. Mills, 677 F. Supp. 2d 51 (D.D.C. 2009) the
5 case that applies to the present facts. "In this case, however, plaintiff has not
6 asserted any breach of contract claim nor sought money damages for any such
7 breach of contract." Id. at 53. Also, unlike Greenhill v. Spellings, 482 F.3d 569,
8 572 (D.C. Cir. 2007), which is also cited by defendant in his memorandum of law,
9 (Docket No. 23, at 4-6), this case makes reference to retaliation claims. In
10 Greenhill the court found that: "The complaint makes no reference to retaliation,
11 and the negative statements by Greenhill's former supervisor, without more, are
12 not self evidently-retaliatory." Greenhill v. Spellings, 482 F.3d at 572. Plaintiff
13 does not make mention of any breach of settlement agreement. A cursory
14 reading, a studied reading and a curious reading of the complaint all lead to the
15 conclusion that this complaint does not invoke violations of a settlement
16 agreement as a predicate for plaintiff's causes of action under the Civil Rights Act,
17 42 U.S.C. § 20003-3 et seq. and the Rehabilitation Act, 29 U.S.C. § 701 et seq.

22 Exhausting Administrative Remedies

23 Defendant's second argument is that because "[n]either the Judgment
24 entered . . . nor the settlement agreement . . . contains a retention of jurisdiction
25 clause to hear a breach of claim . . . the district court lacks jurisdiction to
26 entertain a breach of settlement agreement claim" (Docket No. 23, at 8) and his
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3 third argument stating “[t]here is no indicia . . . that plaintiff exhausted the
4 administrative remedy as to her breach of Settlement Agreement claim as
5 required by 29 C.F.R. § 1614.504” (*id.* at 9) will not be given further consideration
6 because the defendant relies on the allegation that plaintiff is asking for damages
7 for breach of settlement agreement. Again, this case has primarily nothing to do
8 with a breach of contract or settlement agreement but rather presents claims of
9 discriminatory treatment in violation of Civil Rights Laws, 42 U.S.C. § 2000e et
10 seq., as well as under the Rehabilitation Act, 29 U.S.C. § 701 et seq. A reading
11 of the complaint reflects that while mention of the settlement agreement is made,
12 almost in passing, the first acts of discrimination appear in August 2008, (Docket
13 No. 1, at 4, ¶ 2.6), while the settlement agreement was made in 2005. (Docket
14 No. 1, at 3, ¶ 5.2.) The defendant’s pithy argument is rendered ethereal by the
15 reality of plaintiff’s complaint. Albeit, the defendant might be heard via motion
16 in limine based on his argument of estoppel and res judicata. See, e.g., Martínez
17 v. Puerto Rico, 594 F. Supp. 2d 181, 185-86 (D.P.R. 2009). After all, plaintiff did
18 receive \$150,000 in settlement in 2005 for acts including the ones she refers to
19 as factors in her continuing violations theory. See Nat’l R.R. Passenger Corp. v.
20 Morgan, 536 U.S. 101, 117-18 (2002). However, neither of the counts of the
21 complaint should be dismissed because neither is predicated on a breach of
22 contract theory.

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IV. CONCLUSION

5 In view of the above, I recommend that defendant's motion to dismiss
6 under Rule 12(b)(1) be denied.

7 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
8 party who objects to this report and recommendation must file a written objection
9 thereto with the Clerk of this Court within fourteen (14) days of the party's receipt
10 of this report and recommendation. The written objections must specifically
11 identify the portion of the recommendation, or report to which objection is made
12 and the basis for such objections. Failure to comply with this rule precludes
13 further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet
14 v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass.
15 Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health
16 & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13,
17 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);
18 Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

22 At San Juan, Puerto Rico, this day 16th day of March, 2011.

23 S/ JUSTO ARENAS
24 Chief United States Magistrate Judge

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